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No. 242

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**In the Supreme Court of the United States**

**OCTOBER TERM, 1961**

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**THE GLIDDEN COMPANY, DURKEE FAMOUS FOODS  
DIVISION, A FOREIGN CORPORATION, PETITIONER**

**v.**

**OLGA ZDANOK, JOHN ZACHARCZYK, MARY A. HACKETT,  
QUITMAN WILLIAMS AND MARCELLE KREISCHER**

---

**ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF  
APPEALS FOR THE SECOND CIRCUIT**

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**PETITION OF THE UNITED STATES FOR INTERVENTION**

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**ARCHIBALD COX,**

*Solicitor General,  
Department of Justice,  
Washington 25, D.C.*

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## PETITION OF THE UNITED STATES FOR INTERVENTION

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On October 9, 1961, this Court certified to the Attorney General of the United States that the constitutionality of the Act of July 28, 1953, 67 Stat. 226, 28 U.S.C. 171, is drawn in question in this case.

The Solicitor General, on behalf of the United States, prays that an order be entered permitting the United States to intervene and become a party for the purpose of filing a brief and presenting oral argument, pursuant to 28 U.S.C. 2403, in support of the constitutionality of the statute.

Respectfully submitted.

ARCHIBALD COX,  
*Solicitor General.*

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THE GLIDDEN COMPANY, etc.,

*Petitioner,*

*vs.*

OLGA ZDANOK, *et al.*

ON WRIT OF CERTIORARI TO THE UNITED STATES  
COURT OF APPEALS FOR THE SECOND CIRCUIT.

## PETITIONER'S BRIEF.

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LAMBROS J. LAMBROS,  
WHITE & CASE,  
*On the brief.*

## TABLE OF CONTENTS.

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	PAGE
JURISDICTION .....	2
CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED	2
THE QUESTION PRESENTED FOR REVIEW.....	2
STATEMENT OF THE CASE.....	3
SUMMARY OF PETITIONER'S ARGUMENT.....	4
ARGUMENT .....	7
I. The characteristics of the Court of Claims establish it as an Article I or Legislative Court as distinguished from an Article III Court vested with the Judicial Power of the United States .....	9
a. The functions and the powers of the Court of Claims establish it as an Article I or legislative court.....	9
b. This Court has held squarely that the Court of Claims is an Article I or legislative court .....	10
c. The declaration by Congress that the Court of Claims is an Article III court is ineffectual .....	13
d. The distinctions between Article I and Article III courts.....	18

	PAGE
II. The participation by Judge Madden in the hearing and determination of the appeal in the Court of Appeals for the Second Circuit vitiated the judgment of that court.....	20
CONCLUSION .....	25
APPENDIX :	
Constitution of the United States.....	1a
Title 28 of United States Code.....	5a
The Designation and Assignment of Honorable J. Warren Madden.....	8a

## TABLE OF CASES.

	PAGE
<i>American Construction Co. v. Jacksonville, T. &amp; K. W. R. Co.</i> , 148 U. S. 372 (1893).....	24
<i>American Insurance Co. v. Canter</i> , 1 Pet. 511 (1828) .....	10, 18, 21
<i>Ayrshire Collieries Corp. v. United States</i> , 331 U. S. 132 (1947) .....	23
<i>Evans v. Gore</i> , 253 U. S. 245 (1920).....	23
<i>Ex parte Bakelite Corp.</i> , 279 U. S. 438 (1929).....	10, 11, 12, 13, 15, 17
<i>Fraser v. Kelly</i> , 302 U. S. 312 (1937).....	23, 24
<i>Griffin v. Illinois</i> , 351 U. S. 12 (1956).....	24
<i>Kilbourn v. Thompson</i> , 103 U. S. 168 (1880).....	21, 23
<i>Manning v. Ketcham</i> , 58 F. 2d 948 (CCA 6th 1932)....	24
<i>McGrath v. Kristensen</i> , 340 U. S. 162 (1950).....	24
<i>Muskrat v. United States</i> , 219 U. S. 346 (1911).....	9
<i>National Mutual Insurance Co. v. Tidewater Transfer Co., Inc.</i> , 337 U. S. 582 (1949).....	13, 15, 19, 24, 25
<i>O'Donoghue v. United States</i> , 289 U. S. 516 (1933)....	13
<i>Toth v. Quarles</i> , 350 U. S. 11 (1955).....	15
<i>United States v. American-Foreign Steamship Corp.</i> , 363 U. S. 685 (1960).....	23
<i>Williams v. United States</i> , 289 U. S. 553 (1933).....	10, 11, 12, 13, 15, 18, 21

## STATUTES.

## TITLE 28, UNITED STATES CODE,

Section 171 .....	2, 13, 14, 15, 19
Section 293a .....	2, 20, 21
Section 1254(1) .....	2



	PAGE
Section 1491 .....	2, 5, 9, 13
Section 1492 .....	2, 5, 9, 13, 14, 19
Sections 1494 to 1505 .....	2, 5, 9, 13
Section 2509 .....	2, 5, 9, 13
Section 2510 .....	2, 5, 9, 13

#### UNITED STATES CONSTITUTION,

Article I, Sections 1 and 8.....	2
Article III, Sections 1 and 2.....	2, 5, 6, 13, 14, 18, 19, 20, 22
Amendment V .....	2, 6, 20

#### MISCELLANEOUS.

Columbia Law Review, Vol. 61, No. 7, at pages 1363 <i>et seq.</i> (November, 1961).....	4
Congressional Globe, 33rd Congress, 2d Session (1854), pp. 71, 72, 105-106 and 110-114.....	15, 16
The Federalist, Nos. 78 and 79 (Hamilton).....	23
House Report No. 695, 83rd Congress, 1st Session, (1953) .....	15
Letter dated February 16, 1863 from Chief Justice Taney to Hon. S. P. Chase, Secretary of the Treas- ury, 157 U. S. 701.....	22

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## PETITIONER'S BRIEF.

The opinion and judgment of the United States District Court, Southern District of New York, in favor of petitioner, is reported at 185 F. Supp. 441.

The opinion of Honorable J. Warren Madden, Judge of the United States Court of Claims, sitting by designation in the United States Court of Appeals for the Second Circuit, concurred in by Honorable Sterry R. Waterman, Circuit Judge, reversing the judgment of the Southern District Court and remanding the case for further proceedings not inconsistent therewith, and the dissenting opinion of Honorable J. Edward Lumbard, Chief Judge, are reported at 288 F. 2d 99, 105, and at pages 1 to 12 of the transcript.



### **Jurisdiction.**

The statutory provision conferring jurisdiction on this Court is Title 28 of the United States Code, §1254(1).

On October 9, 1961, this Court entered an order (368 U. S. 814 (1961)) granting the petition for certiorari to the United States Court of Appeals for the Second Circuit limited to question (d) presented by the petitioner

(d) Does participation by a Court of Claims judge vitiate the judgment of the Court of Appeals?

### **Constitutional Provisions and Statutes Involved.**

The pertinent text of the Constitution of the United States, Article I, sections 1 and 8, Article III, sections 1 and 2, and Amendment V, together with that of sections 171, 293a, 1491, 1492, 1494 to 1505, 2509, and 2510, of Title 28 of the United States Code is set forth in the appendix hereto. The Constitutional provisions appear at pages 1a to 4a. The provisions of Title 28 appear at pages 5a to 7a.

### **The Question Presented for Review.**

Does the participation of a United States Court of Claims judge in the hearing and determination of an appeal duly taken to the United States Court of Appeals for the Second Circuit, from a judgment of the United States District Court for the Southern District of New York, in a diversity case within the jurisdiction of said courts in virtue of the judicial powers granted under Article III of the Constitution of the United States, vitiate the judgment of the Court of Appeals?

### Statement of the Case.

Respondents commenced this action in the Supreme Court of the State of New York, New York County. The action was removed to the United States District Court for the Southern District of New York upon the ground that that court had jurisdiction by reason of the requisite diversity of citizenship among the parties and the requisite amount in controversy. Each of the five respondents claimed damages for an alleged breach of a collective bargaining agreement between petitioner and the collective bargaining agent of respondents and other former employees of petitioner.

After a trial without a jury (the respondents having waived a jury trial as to the question of liability but reserving the right to trial by jury as to the amount of damages) Honorable Edmund L. Palmieri, the trial judge, ordered judgment for petitioner concluding his opinion by stating:

"In sum, under the circumstances presented in this case, where no relevant limitation on the employer's freedom of action is found in the agreement or the prior conduct of the parties, no policy of New York law or our national labor laws requires the employer to preserve for its employees seniority status acquired under an expired agreement covering a closed plant." 185 F. Supp. at page 449.

Respondents thereafter duly presented this case for review to the Court of Appeals for the Second Circuit. The membership of that court was composed of Chief Judge Lumbard and Circuit Judge Waterman of the Second Circuit, and Judge Madden of the United States Court of Claims sitting by designation. The opinion of the court was rendered by Judge Madden who held that respondents had